INDEX

		Page
A	Opinions Below	1
B	Grounds Upon Which Jurisdiction of This Court Is Invoked	2
C	Questions Presented for Review	2
D	Statutes and Constitutional Provisions Involved	3
E	Statement of the Case	6
F	Reasons for Allowing Writ	8
G	Conclusion	41
H	Certificate of Service	42

Appendix

TABLE OF CASES AND AUTHORITIES CITED

Page

Boykin v. U. S.,
5 Cir. 1926, 11 F.2d 484 25

Brown v. United States,
S.D.N.Y. 1960, 188 F.Supp. 624, 626 17

Emspak v. United States,
349 U.S. 190, 75 S.Ct. 687 16

Ex Parte Bain,
121 U.S. 1, 7 S.Ct. 781 34

Harlow v. U. S.,
5 Cir. 1962, 301 F.2d 361, Cert. Den. 371 U.S. 814, 83 S.Ct. 25, rehearing denied, 371 U.S. 906, 83 S.Ct. 204 17

Hedgepeth v. U. S.,
D.C. Cir. 1966, 364 F.2d 684, 687 15

Ingraham v. United States,
360 U.S. 672, 79 S.Ct. 13, (1959) 40

Klopfer v. North Carolina,
386 U.S. 213, 87 S.Ct. 988 16

Marshall v. U. S.,
D.C. Cir. 1964, 337 F.2d 119 16

Osborne v. U. S.,
9 Cir. 1967, 371 F.2d 913, cert.den. 387 U.S. 946, 87 S.Ct. 2082 16

BLEED THROUGH POOR COPY

TABLE OF CASES AND AUTHORITIES CITED (cont.)

	Page
People v. Prosser, 309 N.Y. 353, 130 N.E. 2nd 891, 57 A.L.R. 2nd 295	17
Pollard v. U. S., 352 U.S. 354, 77 S.Ct. 481 (1957)	16
Russell v. U. S., 82 S.Ct. 1038 (1962) 369 U.S. 749	25, 34
Silverman v. United States, 5 Cir. 1954, 213 F.2d 405	24
Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270	34
U. S. v. Dillon, S.D.N.Y. 1960, 183 F.Supp. 541	17
U. S. v. Ewell, 383 U.S. 116, 86 S.Ct. 773 (1966)	16
U. S. v. Hess, 124 U.S. 483	25
U. S. v. Kelly, 2 Cir. 1965, 349 F.2d 720	17, 18
U. S. v. Lustman, 2 Cir. 1958, 258 F.2d 475, cert.den. 358 U.S. 880, 79 S.Ct. 118	17, 18

TABLE OF CASES AND AUTHORITIES CITED (cont.)

	Page
United States v. Rabinowitz, 6 Cir. 1964, 327 F.2d 622	41
United States v. Simmons, 96 U.S. 360	25
United States v. Strauss, 5 Cir. 1960, 285 F.2d 953	25
American Bar Association Project on Minimum Standards for Criminal Justice Relating to Speedy Trial (1967) p. 17	17
Constitution, Amendment 5 and 6	2, 3, 9, 12, 23
57 Columbia Law Review 846, 853 (1957)	17
Rule 7(c) Federal Rules of Criminal Procedure	4, 5, 23, 24
Rule 48(b) Federal Rules of Criminal Procedure	4, 13, 16
Rule 50 Federal Rules of Criminal Procedure	4, 15
Title 18 U.S.C. § 1341	4, 23

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. _____

DORY AUERBACH and IRVING GOTTLIEB,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A

OPINIONS BELOW

The petitioners herein, Dory Auerbach and Irving Gottlieb, seek a writ of certiorari to review the judgment and decision of the United States Court of Appeals, Fifth

NOTE: All emphasis supplied
R: Record before Fifth Circuit

Circuit, in the case of *United States of America, Plaintiff-Appellee, v. Dory Auerbach, Irving Gottlieb, and David Prosser Randell, Defendants-Appellees*, case no. 26343, which affirmed judgments of conviction against each petitioner, entered in the United States District Court in and for the Southern District of Florida. The convictions were for Mail Fraud, in violation of 18 U.S.C., §1341.

Copies of the opinion of the Fifth Circuit, dated December 9, 1969, affirming the convictions; the judgment of the Fifth Circuit, dated December 9, 1969; and the opinion-decision denying the petition for rehearing, dated February 26, 1970, are appended hereto as Appendix "A", "B", and "C", respectively.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, were dated and entered on December 9, 1969. A timely petition for rehearing was denied on February 26, 1970. Jurisdiction is invoked pursuant to 28 U.S.C., §1254(1).

C

QUESTIONS PRESENTED FOR REVIEW

1) WHETHER DEFENDANTS WERE DEPRIVED OF SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL.

BLEED THROUGH POOR COPY

2) WHETHER INDICTMENT OF DEFENDANTS WAS FATALLY DEFECTIVE SO AS TO VIOLATE RIGHTS OF DEFENDANTS UNDER FIFTH AND SIXTH AMENDMENTS; AND WHETHER INDICTMENT IMPROPERLY WAS AMENDED BY PROSECUTION IN GUISE OF BILL OF PARTICULARS, IN VIOLATION OF SAID AMENDMENTS.

3) WHETHER GUILT OF DEFENDANT GOTTLIEB WAS PROVED BEYOND A REASONABLE DOUBT.

D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

A) The Sixth Amendment to the Constitution of the United States of America

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial".

B) The Fifth Amendment to the Constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . . "

C) The Sixth Amendment to the United States Constitution provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation";

D) Rule 7(c) of the Federal Rules of Criminal Procedure provides:

> "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charge . . . "

E) Finally, Title 18 U.S.C. §1341, pursuant to which the indictment was returned here, provides:

> "whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell . . . places in any post office . . . for mail matter . . . to be sent or delivered by the Post Office Department . . . or knowingly causes to be delivered by mail according to direction thereon . . . any such thing", is guilty of mail fraud.

F) Federal Rule of Criminal Procedure, Rule 48(b) Dismissal

> "By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

G) Federal Rule of Criminal Procedure, Rule 50

BLEED THROUGH, POOR COPY

Calendars

"Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable."

H) Federal Rule of Criminal Procedure, Rule 7(c)

The Indictment and the Information

"Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

E

STATEMENT OF THE CASE

The petitioners, Dory Auerbach and Irving Gottlieb (together with David P. Randell) were indicted by an Arizona Grand Jury on March 14, 1963. They were charged in 22 counts, with Mail Fraud, in violation of Title 18 U.S.C. §1341, (see A. Exhibit 1), and pleaded not guilty on April 29, 1963 (D., April 29, 1963) (R. 2585-2601). Trial was commenced on January 29, 1968 in the United States District Court in and for the Southern District of Florida, non-jury, before the Honorable C. Clyde Atkins, almost five years later, and was not completed until February 15, 1968 (R. 2584).

The defendants filed a pre-trial motion to dismiss the indictment for denial of right to speedy trial, and likewise challenged the validity of the indictment (R. 2779-2780; 2800-2801). The motions were denied (R. 2994).

The defendants, who had waived a jury (R. 2993), were found guilty on all counts (R. 2572-74). Motions to dismiss at the conclusion of the Government's case, and for judgment of acquittal at the close of all the evidence, were made and denied (R. 1557, 2572).

Thereafter, the defendants moved for a new trial; specifically again moved for dismissal for lack of speedy trial; and the defendant Gottlieb in a separate motion, renewed his motion for judgment of acquittal (R. 3022-29). The motions were denied (R. 3043).

The defendants were given suspended sentences, placed on probation; and fined (R. 3045; 3047). From these judgments of conviction, Auerbach and Gottlieb filed appeals (R. 3091, 3097). Randell filed a separate appeal.

BLEED THROUGH POOR COPY

On appeal, the Fifth Circuit stated the issues as follows:

> "PER CURIAM: This appeal presents the following questions: (1) Is the indictment charging defendants-appellants with violating the Federal Mail Fraud Statute, §1341 of Title 18, U.S.C. so vague and indefinite as to deprive the defendants of their rights under the Fifth and Sixth Amendment, and Rule 7(c) of the Federal Rules of Criminal Procedure? (2) Were the defendants denied their Sixth Amendment right to a speedy trial? (3) Was the evidence sufficient to sustain the conviction of the defendant Gottlieb? . . . " (See Appendix "A")

The Fifth Circuit answered these questions against the defendants holding, in essence, that the indictment covered the essential elements of the crime, that is 1) a scheme to defraud, and 2) use of the mails to effect this scheme; that the indictment was as specific as it could be short of pleading evidence which was not required; and that the indictment was sufficiently specific so as to prevent surprise.

In the same vein, the Court below held simply that the Bill of Particulars did *not* supplement or change or affect the indictment.

On the "speedy trial" issue, the Court below held that the delays in the cause "were not caused by any arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the Government" and held further that "Similarly, the appellants have suffered no serious

prejudice as a result of the delays which did not ensue from the ordinary and inevitable delays"; and that the defendants themselves sought the aid of the judicial process on the venue issue and "realizing the deliberateness that a Court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon". (See Appendix "A").

As to Mr. Gottlieb, the Court found that the evidence was sufficient to support the finding of the trial court that Mr. Gottlieb "participated in the scheme to defraud" beyond a reasonable doubt.

The petitioners respectfully disagree with these conclusions, and believe that grave and serious Constitutional Issues are presented with regard to the indictment and speedy trial issues; and, or that the rulings of the Court below conflict with prior decisions of this Court, and other Circuits, and that the Court should grant the petition and pass upon the issues.

Detailed factual matter is inextricably intertwined with the legal issues; for this reason, the facts relevant to each issue are discussed in F, infra, "Reasons for Allowing Writ."

F

REASONS FOR ALLOWING WRIT

1) DEFENDANTS DEPRIVED OF SIXTH AMENDMENT RIGHT TO SPEEDY JURY TRIAL.

Trial here, of course, was had some four years and ten months after indictment.

Amendment 6 to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"

History of Delay

After indictment, the defendants, residents of the Southern District of Florida, moved for a change of venue to that forum, from the District of Arizona; after original denial, their motion ultimately was granted, but the trial court in Florida returned the case to Arizona, whereupon the defendants appealed, lost on procedural grounds, then applied for certiorari and again lost; then filed a mandamus petition and again lost (R. 2612, 2715, 2719, 2762, 2836). However, the Arizona Court then granted their new motion to transfer to the Southern District of Florida (R. 2770-2773). The matter eventually proceeded to trial.

The delay of four years and ten months totally violated the speedy trial right of these defendants under the Sixth Amendment. The delay which resulted from appellate proceedings, which were instituted by the defendants, nevertheless could not be attributed to the defendants. Moreover, for other prolonged periods, totally unconnected with the venue problem and appeal, nothing transpired at all with reference to this cause; much of this delay was at the request of the prosecution or resulted from government inaction, or mere dormancy of the file.

The docket entries show that the government requested 14 days (over and above the defendants original request), for arraignment. Arraignment was had on April 29, 1963. The next step was taken by the defendants who, on August 16, 1963, filed a motion to transfer to the Southern District of Florida (R. 2613). A period from arraignment of almost four months had passed.

The hearing on the motion, originally set for October 7, 1963 was postponed to October 28. (After the original hearing date, the government, on October 18, 1963, had filed its memorandum in opposition (R. 2638-2653) and the defendants had replied on October 25, 1963 (R. 2654-58)).

On November 18, 1963, 21 days after hearing, the motion to transfer was denied. This made a 94 day delay on the motion to transfer. Discovery motions, filed by the defendants on October 28, 1963 (R. 2660-65) were, on November 18, 1963, set for hearing on November 29, 1963, so another 11 days passed.

The defendants on November 29, 1963, then moved for rehearing on the change of venue, and hearing was set for December 9, 1963 (R. 2669-2670) but was put off by agreement of counsel until January 6, 1964. In the meantime, after the original hearing date, the government filed its opposition to the rehearing and discovery. The hearing was continued until January 27, 1964, on stipulation. (Docket entries).

After hearing on January 27, 1964, the Court reserved ruling on pending motions including rehearing on venue; *then* on February 4, 1964 ruled that it would reserve ruling

BLEED THROUGH POOR COPY

pending decision in the "Platt" case. *Nothing* was done then, to bring the case on for trial, or to advance it, until May 7, 1964. Over *three months* had transpired. At this juncture, the matter was set for trial on October 1, 1964.

On June 26, 1964, another judge took over the case, and heard pending motions on July 27, 1964, a month later. Between the order of May 7, 1964, and this hearing, over 11 weeks passed. The Court ruled on the discovery motions and granted the motion to transfer to the Southern District of Florida (R. 2698, 2700, 2707). The formal order to transfer, dated July 27, 1964, was entered on August 13, 1964. Seventeen additional days had elapsed (R. 2707).

Three weeks more passed until the file was received in the Southern District of Florida, on September 4, 1964. Almost *three weeks* more passed, until September 24, 1964 —and nothing happened. On that date the government was given *eight days more*, until October 2, 1964, (with defense consent) to file the required bill of particulars (R. 2710-2714).

For *over five months* nothing happened. On March 4, 1965, the District Court for the Southern District of Florida, *on its own volition, without motion or request*, filed an order retransfering the case to Arizona (R. 2715-2716). The order setting the case for trial on October 1, 1964 still existed. The defendants in the meantime filed a motion for immediate trial, with notice of hearing, on March 8, 1965 which was returned to them on March 11, 1965. (R. 2717-2718 and docket entry).

And aggrieved as they were by the oppressive retransfer of March 4, 1965 the defendants on March 8, 1965,

filed a notice of appeal from the order of retransfer, which appeal was dismissed as interlocutory (R. 2719, 2763-68). A motion for hearing was denied on July 30, 1965. Judge Brown dissented, strenuously.

A petition for certiorari filed September 27, 1965, was denied with a dissent on December 13, 1965 (R. 2836). A petition for mandamus in the Fifth Circuit was denied January 5, 1966 and the record was returned to Florida on January 7, 1966 (R. 2762). Over *three months* then passed; from January 7, 1966 to April 15, 1966, nothing happened. Then the record was transmitted to Arizona (R. 2769).

From April 15, 1966 until re-transfer to the Southern District of Florida, by order dated, December 13, 1966, upon defendants' prior motion made on October 6, 1966, nothing happened in Arizona (R. 2770-2773). Almost a month more passed and on January 11, 1967, the cause was re-assigned to Judge Atkins (R. 2774).

An order for pre-trial conference was entered (R. 2775-77); and a notice setting trial for January 29, 1968 was entered on July 28, 1967 (R. 2778). Nothing happened in the interim. On December 11, 1967 the defendants moved to dismiss for lack of speedy trial (R. 2800). The motion was denied (R. 2994).

Violation of Sixth Amendment Right Shown — Substantial delays not responsibility of Defendants; No Waiver exists

The Sixth Amendment, United States Constitution, affords to defendants in criminal cases a right to a speedy

BLEED THROUGH POOR COPY

and public trial (And see, Rule 48 (b); *Federal Rules of Criminal Procedure;* the Court, of course has inherent power to dismiss, as restated by the rule, for want of prosecution).

Here, the defendants, at worst actually were responsible for only a relatively minor portion of the wasted time. A significant portion of the delay, of course, was the result of the venue dispute. The selection of the Arizona forum was the government's. This was incredibly burdensome to these defendants—who lived, and were known intimately only in Florida. Having selected the Arizona forum, so far from the home of these defendants, and having made its own bed, the government had now to sleep in it, and bear responsibility for the ensuing problems.

The defendants clearly were entitled to move to transfer their case to Florida. Their efforts were opposed by the prosecution, and they were beleaguered by the conflicting exercises of discretion of the Arizona and Florida District Courts.

The appellate proceedings, and much of the resultant delay readily could have been avoided if a) the truly appropriate forum were selected by the government in the first instance; or b) the Florida District Court did not, on its own, *retransfer* the matter to Phoenix on March 4, 1965 (when the indictment already was almost 2 years old). Between March 4, 1965 and December 13, 1966, (when Florida finally accepted the case—where it always belonged), *no* delay fairly may be attributed to the acts of the defendants. Certainly the appellate procedures employed to secure to the defendants their venue rights were justified. And certainly the delay from January 7, 1966,

the date of conclusion of the appellate proceedings, to December 13, 1966, was not the fault of the defendants, nor was any post-appeal delay arising out of transfer to Arizona, then ultimate retransfer to Florida, and then further dormancy of the file in Florida.

The delays here, for which these defendants were at all responsible, were slight when compared with the overall: for example, at the outset of the case, after arraignment on April 29, 1963, (which was delayed two additional weeks at government request), *nothing* was done until the defendants, on August 16, 1963, moved for change of venue, which motion, in turn, was not determined until November 18, 1963. This was eight months after indictment and over 90 days after the motion was filed; and over 200 days from arraignment.

Eight months passed between the motion for rehearing in Arizona on the application to change venue and the ruling. The motion was made on November 29, 1963; it was granted July 27, 1964, and order was not entered until August 13, 1964 (R. 2707).

The Florida Court received the file on September 4, 1964, and retransferred it *on its own, six months later,* on March 4, 1965. And at this point, the defendants' application for an immediate trial, filed right after the suasponte *retransfer*, was returned to them. This was almost two years after indictment.

The appellate gauntlet then was run by the defendants—not surprisingly—in an effort to be tried in Florida. These procedures ran from March 8, 1965 to January 7, 1966. All of this was not really the responsibility to defend-

BLEED THROUGH POOR COPY

ants. Thereafter, a 14 week delay followed; to April 15, 1966, when the file was returned to Arizona.

Then there was a delay to December 13, 1966 when the *retransfer* to Florida was granted. Certainly there should have been no such further delay, either in Florida or in Arizona. Then over a year passed in Florida (December 13, 1966-January 29, 1968), before trial.

Accordingly, as a matter of simple justice, the motion to dismiss should have been granted. The trial dockets between 1963-1967 in the Arizona District, and in the Southern District of Florida (Miami), certainly would have permitted a more expeditious trial, to say the least (R. 2859-2895). Criminal cases clearly are entitled to preference; (see Rule 50, *Federal Rules of Criminal Procedure.)* The delays, then, if caused at all, or attributable at all to the defendants, were much more attributable to the government or mere inertia. The delays not attributable to the defendants by any stretch of the imagination, still were unreasonable, and alone require a dismissal of this indictment.

Delay Unwarranted and Oppressive Under Sixth Amendment; No Waiver Through Inaction of Defendants

Time is but one factor to be considered in a case such as this. But as the time between arrest and trial increases, so too does the burden on the government in contending that the right to a speedy trial has not been denied, *Hedgepeth v. U. S.*, D.C.Cir.1966, 364 F.2d 684, 687. A delay will not result in dismissal if it is not oppressive or vexatious or purposeful. On the other hand, if the delay is, in the aggre-

gate, oppressive or vexatious or arbitrary, or purposeful, dismissal should result; see, *Polland v. U.S.*, 352 U.S. 354; 77 S.Ct. 481 (1957); *Marshall v. U. S.*, D.C.Cir.1964, 337 F.2d 119; and see. *U.S. v. Ewell*, 383 U.S. 116, 86 S.Ct. 773 (1966). This is not a case where the defendants caused or sought the majority portion of the delay, cf *Osborne v. U. S.*, 9 Cir. 1967, 371 F.2d 913, cert.den. 387 U.S. 946, 87 S.Ct. 2082. True they appealed, but only when confronted with the surprise and burden of the *sua sponte* retransfer.

The delay, by any definition of the term, was oppressive here and vexatious. There are a mass of authorities, concederly, which hold that a defendant may not complain where he does not seek a speedy trial or move for it. But research reveals no Supreme Court decision that holds that a defendant "waives" his right to a speedy trial unless he presses for it. The prosecution is charged with bringing a criminal case to trial. Nothing in the Sixth Amendment suggests that a defendant must prod or beg for his trial. A doctrine which would permit a finding of "waiver" of a basic and fundamental constitutional right, such as the right to a Sixth Amendment speedy trial, simply because the accused does not move for it, directly conflicts with established Constitutional principals.

There can be no question that the trial courts must "indulge every reasonable presumption against a waiver of fundamental constitutional rights" assured to a defendant in a criminal case. *Emspak v. United States*, 349 U.S. 190, 75 S.Ct. 687 (1955); and see, *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988 (6th Amendment rights among the most basic). Nothing in the Constitution or in Rule 48 of the *Federal Rules of Criminal Procedure* makes it incumbent upon the defendant to demand a speedy trial to avail himself of his fundamental right.

BLEED THROUGH POOR COPY

The body of decisions espousing such a view basically and simply should not be followed. There is no virtue in forcing a defendant to press for speedy trial. If he were required to do so, the state could no nothing until the defendant acted and then if the defendant acted too late, claim waiver; see, 57 *Columbia Law Review 846, 853* (1957) (discussing logical minority view); *People v. Prosser*, 309 N.Y. 353, 130 N.E. 2nd 891, 57 A.L.R.2d. 295 (carefully reasoned opinion by Judge Fuld of the New York Court of Appeals); *American Bar Association Project on Minimum Standards for Criminal Justice Relating to Speedy Trial* (1967), p. 17; *U.S. v. Dillon*, S.D. N.Y. 1960, 183 F.Supp. 541; *Brown v. United States*, S.D. N.Y. 1960, 188 F.Supp. 624, 626. The latter cases in the Southern District of New York simply refused to follow the reasoning of *U. S. v. Lustman*, 2 Cir. 1958, 258 F.2d 475, cert.den. 358 U.S. 880, 79 S.Ct. 118, that failure to demand an early trial constitutes a waiver of the right, irrespective of any inordinate delay.

Indeed, in 1965, the very same Second Circuit which decided *Lustman*, supra, indicated its dissatisfaction with the waiver doctrine, when predicated solely upon the failure of the defendant to move for a speedy trial. See *U. S. v. Kelly*, 2 Cir. 1965, 349 F.2d. 720.

In *Harlow v. U.S.*, 5 Cir. 1962, 301 F.2d. 361, cert. denied, 371 U.S. 814, 83 S.Ct. 25, rehearing denied, 371 U.S. 906, 83 S.Ct. 204, the court found, under all of the circumstances, no unreasonable delay in a three year situation. The court remarked that if there were unreasonable delay the defendant's failure to demand a trial sooner constituted a waiver in any event. But this language was unnecessary to the decision, and simply should not be fol-

lowed here. The court relied in part on the *Lustman* case, supra, which has been seriously questioned by the very court which decided it; *U.S. v. Kelly*, supra. Of course, in this case, a motion for immediate trial actually was made by the defendants and lost in the maze of transfers and retransfers, in March of 1965.

A four year and ten month delay clearly is oppressive. In some sense the delay might be said to have been "purposeful" inasmuch as the government so strenuously fought the ultimate venue in Florida. Be that as it may, the case has dragged on for an inordinate amount of time. The effect of the pending indictment and the oppression and the harm caused to the defendants can not really be questioned (R. 2508). When they could take it no more, they moved to dismiss. The motion was denied erroneously.

Prejudice Clearly Resulted from Delay.

As in the case of the so-called requirement that the defendant "demand" a speedy trial, other courts have imposed upon the defendant the burden to show "prejudice" resulting from the delay. Once again this burden is not contained in the Sixth Amendment itself. And strangely enough, a leading case requiring a "demand" for a speedy trial likewise held that the showing of prejudice was not really required after an inordinate delay, when a criminal defendant asserted his Constitutional right to a speedy trial under the Sixth Amendment, *U.S. v. Lustman*, supra, but even if prejudice were required, surely it existed here. Certain letters between the co-defendant, Randell, and appellant, Dory Auerbach, were introducted into evidence at the trial. They revealed the most private of thoughts and confidences between these men. They could have had a bearing

easily on the court's determination on the vital issue of intent (R. 2319-2334; G.X. 66, R. 2385). They were written between 1963 and 1965 subsequent to the filing of the indictment and were turned over to the government just before the trial in 1957 by co-defendant Randell's former wife (R. 2381-2390). This witness, who testified for the government, had been divorced from the co-defendant, Randell, only in 1965 (R. 1304). The letters had been left in Randell's former office in Arizona, and he had not turned them over to the government. Since they were not turned over to the government until 1967, when the government witness supplied them to Post Office Inspectors, the undue delay in the trial resulted in prejudice—the government through the delay benefited and by definition the defendants suffered. Efforts to suppress the use of these letters apparently were not successful. (2385-2395). Accordingly, even if prejudice were required, after a delay of almost five years, for the defendants to avail themselves of their basic constitutional right—which is doubtful—prejudice surely existed here. The motion to dismiss for lack of speedy trial should have been granted before the trial, and should have been granted when renewed subsequent to trial. The Fifth Circuit erred in affirming in the fact of the violation of the Sixth Amendment right.

2. INDICTMENT WAS DEFECTIVE FOR FAILURE TO ALLEGE FACTS SHOWING EXISTENCE OF ELEMENTS OF MAIL FRAUD; INDICTMENT IMPROPERLY AMENDED BY PROSECUTION IN GUISE OF BILL OF PARTICULARS—INDICTMENT SHOULD BE DISMISSED — CONSTITUTIONAL RIGHTS UNDER FIFTH AND SIXTH AMENDMENTS VIOLATED.

a) *Indictment Deficient For Failure To Allege Why or How Advertisements Were "Fraudulent".*

In count one, the grand jury jointly charged the defendants with a "scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations, and promises from persons residing throughout the United States". A designated group of persons was named in the indictment. According to the charges of the grand jury, the defendants prevailed upon these persons to buy real property or lots in a subdivision called Lake Mead Rancheros, owned by the defendants' corporation. The property was allegedly located in Mohave County, Arizona. The ads of the defendants were part of the alleged fraudulent scheme (R. 2585-2601; indictment; see Appendix D, infra.)

Count one further asserted that the defendants, as part of their fraudulent scheme, bought certain lands and subdivided it into "units one through seventeen, consisting of 5,513 lots"; that the defendants publicly offered and sold these lots on the installment plan through the aid of newspaper advertising and direct mail to customers; and that the scheme also included the device of causing customers' mail to be sent to an address in Kingman, Arizona to foster the belief of the public that they were dealing with Lake Mead Rancheros, Inc. in Arizona, rather than in Florida where the mailing records of the company actually were ultimately received and processed.

Count one then set forth in paragraph six, certain advertisements generally concerning the land and area, which the defendants had run or mailed, and alleged that the

BLEED THROUGH POOR COPY

representations were "deceptive, false and fraudulent". The advertising was of the character one would expect to read in land sale or subdivision promotions in the due course of business. These statements [paragraphs six (a) - (d)] were, according to the grand jury, "*false and fraudulent.*" They were part of the supposed "scheme" to defraud. The accusatory portion of the indictment simply tracked the mail fraud statute (Title 18 U.S.C. §1341). In not one instance, however, did the indictment allege in any respect whatsoever just *how and why* and in what regard any statement or representation was false or fraudulent or even misleading.

The Court dismissed paragraph seven (R. 2851; 2907-2908, 2933), which had alleged that the defendants, as part of the so-called criminal scheme, had contracted to purchase certain land, called Unit 20, on U. S. Route 66, about six miles from the existing lots comprising Units 1-17; and that this land contained power lines, telephone lines and water lines. No false or fraudulent conduct or statements were alleged with regard to paragraph seven. Likewise paragraph six (c) of the indictment was stricken by the Court (R. 2851).

Paragraph eight, and the sub-paragraphs, (a) - (f), quoted, in particular, various quotes from literature allegedly mailed or published in newspapers by Lake Mead Rancheros, Inc. According to the indictment, the ads were "*deceptive, false, and fraudulent representations,* commencing about the middle of September, 1962, and continuing to on or about January 2, 1963". The indictment further alleged that the defendants so acted "well knowing at the time that the representations would be, and were, deceptive, *false and fraudulent* when made". A simple

reading of the said paragraphs of the indictment demonstrates that they are characteristic of advertisements generally and ordinarily found in subdivision promotion. The indictment again tracked the language of the statute, but not in a single specific instance did the indictment aver just how or why any single statement or concept was false, fraudulent or even inaccurate.

The Grand Jury charged in paragraph nine that the defendants had used a photograph in their advertisements which was falsely labeled. The photograph and description again generally were branded, "*deceptive*" and "*false*" and "*fraudulent*". Not one allegation may be found in paragraph nine apprising the defendants of just what was mislabeled or what was false or fraudulent or just how anything stated in paragraph nine was false or fraudulent. The hows and whys again were left blank.

Finally, the Grand Jury charged in paragraph 10 that the defendants withheld from their materials the information that various of the subdivision units consisted only of odd-numbered sections of land in an area where even-numbered sections of land were owned by and subject to use by the Federal Government for grazing. This was allegedly part of the "scheme and artifice to defraud" and once again it is not really pointed out just how or why the supposed failure to disclose the fact of odd-numbered ownership fit into any fraudulent scheme of just how it constituted fraud.

Paragraph eleven alleged the receipt of a check mailed by a customer to Kingham, Arizona, in aid of the execution of the "scheme and artifice to defraud".

The remaining counts of the indictment contained the precise allegations of paragraphs one through ten of count one of the indictment, and differed only in the eleventh paragraph which designated a different customer and different check. It is apparent, therefore, that the indictment was totally deficient in that it was lacking in the "hows and whys". At no time did the indictment sufficiently state just how and why the advertisements were "fraudulent" as alleged, or where and in what respect they departed from the truth.

a) *The Fifth Amendment to the Constitution of the United States* provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . .".

b) *The Sixth Amendment to the United States Constitution* provides in relevent part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation";

c) Rule 7(c) of the Federal Rules of Criminal Procedure provides: "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charge. . . ."

d) Finally Title 18 U.S.C. §1341, pursuant to which the indictment was returned here, provides: "whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell . . . . places in any post office. . . . for mail matter. . . . to be sent or delivered by the Post Office Department . . . or knowingly causes to be delivered by mail according to direction thereon . . . any such thing", is guilty of mail fraud.

A careful reading of this indictment demonstrates that the material accusatory portions merely follow the wording of the statute in charging a scheme or artifice to defraud through false and fraudulent representations by the defendants. There is no dispute that the advertisements and language contained in the indictment was sent through the mails. There is no dispute but that the defendants used the United States mail and the Post Office in promoting their land sales. But there is dispute as to whether the indictment is sufficient under the *Fifth* and *Sixth Amendments*, and the *Federal Rules of Criminal Procedure, Rule* 7(c).

Lacking here, of course, was the allegation of how or why any statement was fraudulent or false. In evaluating the indictment here, the contrast between the allegations and those found in, for example, *Silverman v. United States*, 5 Cir. 1954, 213 F.2d 405, cert.den., 348 U.S. 828, 75 S.Ct. 46, must be considered. There, the indictment charged that the crime consisted in use of printed slips in the "similtude" of statements used by the Southern Bell Tel and Tel Company. These slips purported to signify to recipients that they were statements for accounts of previously published listings. In short, the indictment charged the "hows" and "whys" of the fraud. The explanation of the fraud was contained in the indictment. On the other hand, no such explanation or information is contained in the indictment here. Unlike the defendant in *Silverman*, the defendants were not informed as to the nature of the accusations against them. They were not told the real nature of the fraud which was being attributed to them, or how or why their advertising departed from the truth. Without such an explanation, the indictment was fatally defective.

BLEED THROUGH POOR COPY

Cases which demonstrate the insufficiency of indictments which merely track the words of a statute but fail to specify in just what factual respect the defendant is guilty of the crime charged are: U. S. v. Strauss, 5 Cir. 1960, 285 F.2d 953; *Boykin v. U.S.*, 5 Cir. 1926, 11 F.2d 484; see also, *U.S. v. Hess*, 124 U.S. 483; *U.S. v. Simmons*, 96 U.S. 360; and *Russell v. U.S.*, 369 U.S. 749, 82 S.Ct. 1038. While a mass of specific advertisements are alleged here, still the indictment is totally devoid of allegations explaining *why or in what respect the ads were false and fraudulent.* In this vital respect, there is a vacuum—and therefore the cited authorities control.

It is clear, of course, from all of these cases, and it is fundamental law, that the language of the statute may be used in the general description of the offense but it must be accompanied with a statement of facts and circumstances *sufficient to inform the accused of the specific offense with which he is charged.*

Here, each and every statement contained in the indictment was of a nature found ordinarily in real estate promotions. There was nothing alleged in the indictment which showed or designated a departure from the truth or specified wherein the truth rested. There were allegations generally of fraud, but no correllative explanations of truth. Thre was nothing which showed any departure from the truth or in what respect any of the ads departed from the truth.

b) *Bill of Particulars Improperly and Unlawfully Amended Indictment*

The District Court of Arizona, upon motion of the defendants, ordered the government to state in what respect statements attributable to the defendants in the indictment were false (R. 2700).

The Arizona Court, in granting the motion for a Bill of Particulars, significantly remarked (R. 2756) at a time prior to any motion to dismiss the indictment, as follows:

> "I think you should have a superseding indictment on this matter. I don't think you should rely on a Bill of Particulars to supplement an indictment here with all the charges against these people—serious charges too".

The purpose of the motion for the bill of particulars was to compel the government to specifically point out how or in what manner the representations in six (a)-(d); eight (a)-(f); and nine of the indictment were false and fraudulent (R. 2700). The bill of particulars then purported to set out the facts comprising the alleged fraud (R. 2711-14; A., Exhibit 2; filed in Southern District of Florida on October 2, 1964). In reality, the bill superseded the original indictment and was an absolutely new indictment—with one problem—it was not filed or returned by a grand jury.

The amendment by the government—as opposed to the grand jury itself—is readily apparent when the indictment allegations are compared to the bill of particulars. A side by side analysis of the indictment on the one hand and the bill of particulars on the other demonstrates the inherent defects in the pleadings upon which these defendants were tried.

BLEED THROUGH, POOR COPY

INDICTMENT	BILL OF PARTICULARS
Count I, paragraph 6(a)	**Paragraph I of the bill, with reference to 6(a) of the indictment[2]**
Charges as false and fraudulent the following representations: That the Lake Mead Rancheros subdivisions were located "on a through route to Lake Mead"; that "the through route from Highway 66 to Lake Mead winds gracefully through the Rancheros"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to the giant Lake Mead Recreational Area"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to two of the most favored sites in the giant Lake Mead Recreation Area"; that the Rancheros "are directly on Hackberry Road, main route to the Lake Mead Recreation Area".	The bill of particulars, with reference to the allegations in paragraph 6(a) of the indictment simply departs from the indictment or adds to it or amends it. It refers to 3½ million visitors to the Lake Mead Area, and the effect defendants' advertising would have upon prospective purchases in view of such number of visitors. The indictment contains no such allegations. The government contends in this portion of the bill of particulars that "Hackberry Road" did not lead to two of the most favored sites in the Lake Mead area, and named Pierce Ferryboat Landing, and Greggs Ferryboat Landing, as sites to which Hackberry Road led, and challenged their popularity; likewise the bill of particulars contended that Hackberry Road

[2]The Bill of Particulars is annexed hereto as Appendix E.

was not the commonly known through route or thoroughfare to Lake Mead but that the commonly known and used through route, thoroughfare or main routes to Lake Mead and its favored recreational sites was Highway 66 and 93. The bill of particulars further stated that the route on Hackberry Road, a gravel road, from Lake Mead Rancheros property to the two sites named was some 48 miles in distance. Finally, the bill of particulars stated that the questioned ads, as a whole, gave the impression that Lake Mead Rancheros were in the path of the main route to the Lake Mead Recreational Area and thus were exposed to heavy traffic and this was an attractive investment feature.

One searches the indictment in vain for any such concepts, or mention of sites or highways, or evaluations of them.

One searches the indictment in vain for any hint that lurking beneath its allegations were these grand jury thoughts. *None of the matter stated in the bill of particulars is set forth in the indictment. Nowhere does the indictment allege fraud or falsity in these respects, or mention the sites involved, or other routes or highways, or number of visitors, or misleading effect on customers based on such visitors, or any misleadings as to "investment" features of the property.*

INDICTMENT	BILL OF PARTICULARS
Paragraph 6(b)	**Paragraph II, with reference to paragraph 6(b) of the Indictment**
Charges as false and fraudulent statements: That the Lake Mead Rancheros subdivisions were "Laid out, waiting for people", "livable now", "not raw, undeveloped", "fully developed' and "improved".	Claims that falsity existed in this section of the indictment in that somehow the advertisements alleged in the indictment were designed to mislead prospective purchasers into believing that the Rancheros had necessary utilities, power lines, telephone lines and a potable water supply available on original seventeen subdivisions, sufficient to accommodate residential or commercial buildings, but they had no such utilities, and thus were not fully developed or livable.

The indictment did not allege that customers expected any utilities to accommodate residential and commercial buildings, such as power lines, telephone lines, and a potable water supply, and that there were in fact no such utilities available. Only in the bill of particulars was such allegations found. This is a classic case of indictment by the prosecutor—not the grand jury.

INDICTMENT	BILL OF PARTICULARS
Paragraph 6(c) of the indictment dismissed by the court (R. 2855)	**Paragraph IV**
Paragraph 6(d)	The bill of particulars addressed to 6(d) of the indictment found in paragraph IV of the bill of particulars avered that prospective customers were falsely led to believe that the defendants' subdivision had a close "proximity" to Lake Mohave and Lake Mead and Kingman whereas it was 26 miles from Kingman; 57 miles from Lake Mohave; and 48 miles from Lake Mead.
Charges as false and fraudulent statements that "Lake Mead Rancheros is located just a few miles from Kingman, near Lake Mead and Lake Mohave".	

This was an amendment. It readily could have been stated by the grand jury in the indictment if these relative distances were what it had in mind. In this connection, it can be noted that what is close by in the wide open spaces in Arizona is quite different than what is close by, for example, in New York City, with its congested suburbia.

BLEED THROUGH POOR COPY

INDICTMENT	BILL OF PARTICULARS
Paragraphs 8(a)-(f)	**Paragraph V**
Contain a mass of ads and slogans and statements generally found in advertisements of this type, which are alleged to be false and fraudulent. They allegedly were made between the middle of September, 1962, and on and through January 2, 1963. They referred to availability of utilities in the Rancheros; and the acquisition of land extending down Hackberry Road fronting on U.S. 66; and the availability of immediate sites for building.	In this paragraph of the bill, addressed to paragraphs 8 (a)-(f) of the indictment, the government made the revelation that Lake Mead Rancheros had not acquired any such land nor any such utilities.

The grand jury did not allege in the indictment that the defendants had not acquired new property, or that the land did not contain the utilities as advertised. This was the government speaking, not the grand jury. Nothing in paragraph 8 or any of its subparagraphs indicates that the position of the grand jury was that the land upon which the utilities were available, or to which they were available had not been obtained by the defendants. Nothing in the indictment alleges that no such utilities were acquired.

INDICTMENT	BILL OF PARTICULARS
Paragraph 9	**Paragraph VI**
Claims fraud in use of a photograph with a misleading caption. The indictment charged that "It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivisions by use of a falsely labeled photograph, specifically a photograph appearing in an advertising brochure used by Lake Mead Rancheros, Inc., and mailed to prospective lot purchasers, showing land with a power line existing there on and the statement below the picture: "NOW YOU SEE IT! The Valley of the Music Mountains . . . location of Lake Mead Rancheros. This is the land as it looked on June 16, 1961, prior to any development work".; well knowing at the time said pretenses and representations were made that they were deceptive, false and fraudulent."	The bill of particulars, paragraph VI, claims that the power line depicted in the picture was designed to mislead prospective purchasers into believing that it was on Lake Mead Rancheros property whereas in truth and fact, it was not on such property, and that the property depicted was not owned by Lake Mead Rancheros.

BLEED THROUGH POOR COPY

Nothing was alleged in the indictment as to how or why the statements regarding the photograph departed from truth. These averments in the bill of particulars were an amendment to the indictment. Nothing in the indictment even suggests that ownership interest in the land under the power line was falsely represented, or that any part of the land appearing on the photograph was not a part of Lake Mead Rancheros property. This also was the government speaking—not the grand jury.

INDICTMENT	BILL OF PARTICULARS
Paragraph 10	
Merely charged that it was part of the scheme and artifice to defraud the defendants misled prospective purchasers by failing to disclose the material fact that the Rancheros subdivision units consisted only of the odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land were owned by the federal government and subject to use for grazing purposes.	No bill of particulars as to this paragraph was necessary because unlike the other allegations in the indictment, this charge at least disclosed in what respect the defendants allegedly committed a fraudulent act. But, of course, there was nothing inherently wrong or fraudulent in this allegation, standing alone, and obviously this "non-disclosure" could not support the indictment or guilt of these defendants in this case.

What we have seen here, of course, is a superseding indictment by the prosecutor or the government. This was at most a guess by the prosecutor in Miami as to what was in the minds of the grand jury in Arizona at

the time it returned the indictment. A conviction on the facts contained in this bill of particulars could readily be a conviction on charges not found by the grand jury, and perhaps not even presented to the grand jury which indicted these defendants. The Fifth Amendment requires an indictment to be returned by a grand jury. In the words of this Court, a grand jury exists "to afford a safeguard against oppressive actions of a prosecutor or the Court"; *U. S. v. Cox*, 5 Cir. 1965, 342 F.2d 167. The bill of particulars here could not save the defective indictment. *This is a settled rule, Russell v. U.S., supra.* In a word, the prosecutor does not return the indictment—the grand jury does. *And the prosecution may not file a superseding indictment in the guise of a bill of particulars.*

The prosecutor, through a bill of particulars, cannot fill in the deficiencies in an indictment, based on what he knows, or believes he knows, or based upon what he believes the grand jury knew or intended. The matter described in the bill of particulars in no way can be viewed as a logical explanation of the charges contained in this indictment. *Nowhere did the indictment point out in what respect the ads were false or fraudulent, and a statement by the U. S. Attorney cannot supply the deficiency.* A defendant cannot be tried on a crime which was not charged against him by a grand jury. Certainly a trial on charges which were not included in the indictment returned by the grand jury cannot stand. It is established doctrine of law that the Court or the government cannot change the charging part of an indictment to suit notions as to what should have been charged, or what the grand jury probably would have charged if its attention had been called to the facts; see *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781; *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270.

BLEED THROUGH POOR COPY

These cases hold squarely that a defendant may not be tried and convicted on charges that are not made in the indictment against him. This was not a case of simple or slight variance. This bill of particulars and a trial under it resulted in a trial on a superseding indictment returned by the government. It infringed the right of these defendants to have a grand jury make the charges against them on its own judgment. The bill of particulars constituted an amendment and a superseding indictment and of this there can be no doubt. The indictment was defective in that it failed to state just how or why the statements made by the defendants in their advertisements were false and fraudulent. There was nothing inherently fraudulent in them and the indictment never pointed out in one single respect how they departed from the truth.

The bill of particulars then purported to do so, but there simply is no way of showing that this was the matter that the grand jury in Arizona considered in returning the indictment. The trial court should have granted the motions to dismiss. The Fifth Circuit erroneously affirmed and permitted the government to amend the indictment.

3) PROOF INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN CONVICTION OF DEFENDANT GOTTLIEB UPON FINDING OF GUILT BEYOND A REASONABLE DOUBT.

The defendant, Irving Gottlieb was jointly indicted with the co-defendants, Auerbach and Randell. The indictment and convictions were bottomed upon certain pro-

motional activity—which by no means is conceded herein by Mr. Gottlieb to have been criminal in nature. But the very conduct upon which the indictment and convictions were based in no way was the responsibility of Gottlieb. He was not responsible for advertising policy or for promotional work, nor did he participate in the activity which was the basis of the indictment and the convictions herein. The evidence with reference to Gottlieb follows:

a) **Testimony of Dory Auerbach**

Dory Auerbach, principal in Lake Mead Rancheros, Inc. and related companies, testified that the defendant, Gottlieb was a personal friend and had become associated with Mr. Auerbach in the company strictly to process IBM records. He had nothing whatsoever to do with any policy decisions. He was simply an administrator and dealt particularly with IBM records and had nothing to do with policy or advertising of any kind. (R. 2424).

b) **Testimony of David Randell**

David Randell likewise testified. He pointed out that the corporation had been formed in 1961 and that he was the president thereof during the period involved in the indictment (R. 2240-2241). He testified unequivocally that he was "in charge, fully in charge of marketing the subdivisions, and that would include all advertising" (R. 2242). When asked if Mr. Gottlieb had any part in making policy with respect to advertising, Mr. Randell stated that he did not believe so and that "his duties were basically administrative in nature" (R. 2242). Mr. Randell testified that while he wrote the advertising, Mr. Auerbach would support the advertising with data; and Mr. Randell stated that he was responsible to Auerbach and not to Gottlieb

BLEED THROUGH, POOR COPY

(R. 2242). Mr. Auerbach would approve advertisements after they were written and everything would be sent to him first (R. 2243).

c) **Testimony of Evelyn Rodenbaugh**

Mr. Randell's former wife acknowledged that Mr. Gottlieb did not even come out to the property in Arizona until after the indictment and at that time he came out with defense counsel. According to the witness, Mr. Gottlieb "has little to say" (R. 1271).

d) **Testimony of Margaret Paulick**

This former employee of the defendants' company testified that during an Internal Revenue investigation of the affairs of the defendants, Mr. Gottlieb had remarked that if he went to jail that the employees should not bring him cigarettes because he smoked "a pipe" (R. 1121-22). He further remarked that they had hired an accountant with strong connections in Washington (R. 1125). This was not connected up with any advertising or mail fraud or promotional activity (R. 1125-1126).

e) **Testimony of Pearl Donald**

This former employee of the defendants testified that Mr. Gottlieb was the right-hand man of Mr. Auerbach (R. 159), but with regard to advertising, testified that Mr. Randell wrote it out (R. 174). The only time she was present at a meeting with the three co-defendants was with reference to a move from Hollywood to Miami. They never discussed advertising policy in her presence (R. 206).

f) **Testimony of Shirley Haft**

This former employee, who worked in advertising for the defendants' corporation was under the immediate supervision of Mr. Randell. (R. 213-14).

g) **Testimony of Ralph Meyers**

Mr. Meyers was a former executive for the Hurst Newspapers in Boston. Rancheros property was advertised in his newspapers. The ads were placed by Mr. Randell (R. 232). Mr. Gottlieb participated in business discussions on some occasions (R. 233).

h) **Testimony of Eleanore Bacall**

This witness testified that she was hired to work for Lake Mead Rancheros in October 1961 by Mr. Gottlieb as a clerk-typist. Her duties included typing up land-sale contracts on small cards whereupon they were transferred to another office where they were sent off with a letter and package (R. 250). The inner office was managed by Mr. Gottlieb (R. 950). She also received and processed one dollar deposits from prospective customers and turned them over to another department (R. 950-951) for entry on a control sheet. Likewise she received payments on land purchases already consummated (R. 951). She received customer correspondence which was turned over to Mr. Gottlieb or Mr. Randell for answering. (R. 951). She answered much of the correspondence herself—most of it by form letters (R. 951-952). Inquiries concerning availability of power and water on the premises and where the customers could build on their lots or grow and things of that nature (R. 953) would be answered by form or by Mr. Randell who would answer the most difficult inquiries (R. 960). However, when he was gone, she would consult with Mr. Gottlieb (R. 960-963).

BLEED THROUGH POOR COPY

Mr. Gottlieb on some occasions instructed her to assign warranty deeds to customers who had paid for property although the property was in the wash area— as opposed to transferring the properties (R. 978-979); he had also remarked that a tax notice had produced sufficient monies to pay for land and payroll (R. 994-996). He was not in favor of sending an unfavorable final subdivision public report of the State of Arizona out to the customers. (R. 1017-1018). The first conversations with Mr. Gottlieb regarding wash areas were not held until 1964, which was after the indictment (R. 1027).

After the indictment, Mr. Gottlieb was in favor of building a motel out on the premises and demonstrating a livable community (R. 1000). The statements regarding the taxes were made a couple of years prior to the February 1968 testimony of the witness, and thus obviously were also post-indictment (R. 996). This witness did not implicate Gottlieb with any advertising policy for the period involved in the indictment, and in any event her testimony must be considered in the clear light of her grievance with the defendants. She had threatened to sue them and threatened to go to the newspapers and to testify against Auerbach if she were not given certain money she thought she was entitled to upon severance of employment with the defendants after indictment (R. 1020-1024; 1057, 1058-1059).

i) While he was an officer of Lake Mead Rancheros, Inc. and a stockholder, (R. 1355), he simply was not involved in policy in any way, shape or form. Nothing in this record indicates that he was, at least insofar as promotions and advertising are concerned and certainly there is no connection between Mr. Gottlieb and any of the advertising literature or promotions upon which this indictment and these convictions were based. We believe that

the testimony pointed out here completely demonstrates just what was stated with regard to Mr. Gottlieb's position.

Mail fraud at best is a tenuous crime, and the borderline between mere aggressive salesmanship or puffing and criminal behavior is a hazy one indeed. In such a crime particularly, proof must be carefully analyzed with regard to each and every defendant. Mr. Gottlieb was not charged with conspiracy here nor with aiding and abetting. The fact that he was working for Lake Mead Rancheros and was an officer does not mean that he participated in any direct violation of the mail fraud statute. No criminal intent on his part can be established in this case. There is nothing in the record which establishes that Irving Gottlieb, prior to indictment, knew that alleged false representations made by other corporate officers were in fact false.

Criminal intent, of course, is an essential ingredient of mail fraud as it is of most crimes. This element can be shown by nothing less than personal knowledge of the fact that a venture is operating deceitfully. There is no indication at all that Gottlieb had any idea that prior to indictment there was any fraud in the advertising or promotions planned by the co-defendants or that he participated knowingly in any such scheme. The Court could not impute to the defendant, Gottlieb alleged actual knowledge of a deceitful venture by co-defendants. *Ingraham v. United States*, 360 U.S. 672, 79 S.Ct. 13 (1959). There complete void as to a prima facie showing of knowledge on the part of Irving Gottlieb as to any variations between any advertising and promotional literature and the property or any alleged fraudulent scheme. He simply was not involved in this aspect of the operation of the corpo-

ration. His mere status as an officer in itself does not make him individually responsible. *Ingraham v. United States, supra; U. S. v. Rabinowitz,* 6 Cir. 1964, 327 F.2d 62.

Mail fraud cases are difficult enough. Criminality is vague and hazy. The position of someone like the defendant, Gottlieb must be carefully analyzed before a conviction on such a crime can be permitted to stand. A close analysis of all reference to Gottlieb in this record shows absence of responsibility on his part for any of the conduct contained in the indictment or for which the convictions were found. His motions for judgment of acquittal should have been granted. The Fifth Circuit, respectfully, erred in affirming on an insufficient record.

G

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Fifth Circuit reversed as to these petitioners, with instructions to dismiss the indictments.

Respectfully submitted,

WALTER H. BECKHAM, JR.
ROBERT ORSECK

PODHURST AND ORSECK
2nd Floor, Concord Building
66 West Flagler Street
Miami, Florida

By _____
WALTER H. BECKHAM, JR.
Attorney for Petitioners Auerbach and Gottlieb

H

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true and correct copies of the foregoing Petition of Auerbach and Gottlieb for a writ of certiorari was mailed to William A. Meadows, Jr., United States Attorney, U. S. Post Office Building, Miami, Florida and to Joseph J. Lyman, Attorney for Appellant David Prosser Randell, 1200 18th Street, N. W., Washington, D. C. 20036 this ____ day of March, 1970.

By _____

WALTER H. BECKHAM, JR.
Member of
The Bar of
U. S. Supreme Court.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB, and
DAVID PROSSER RANDELL,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(December 9, 1969)

Before WISDOM, GEWIN, and AINSWORTH,
Circuit Judges.

PER CURIAM: This appeal presents the following questions: (1) Is the indictment charging defendants-appellants with violating the Federal Mail Fraud Statute, § 1341 of Title 18, U.S.C. so vague and indefinite as to deprive the defendants of their rights under the Fifth and Sixth Amendment, and Rule 7(c) of the Federal Rules of Criminal Procedure? (2) Were the defendants denied their Sixth Amendment right to a speedy trial? (3) Was the evidence sufficient to sustain the

conviction of the defendant Gottlieb? We hold that the Constitutional rights of the defendants were not violated and that the record affirmatively reflects evidence beyond a reasonable doubt to sustain the conviction of Gottlieb. The judgment of the district court is affirmed.

The defendants were charged in a twenty-two count indictment for violation of the Federal Mail Fraud Statute, § 1341 of Title 18, U.S.C. involving certain real estate transactions. The indictment was returned by an Arizona Grand Jury March 14, 1963, approximately four years and eleven months before trial of the defendants. Before trial the defendants sought to dismiss the indictment on the grounds that: (1) the indictment failed to contain the elements of the crime so as to apprise them of what they must be prepared to encounter and (2) the defendants were deprived of their Sixth Amendment right to a speedy trial. The motion was denied. The case was tried without a jury and the defendants were found guilty on all counts. The district court denied their motions to dismiss at the conclusion of the Government's case and for judgment of acquittal at the close of all the evidence.

I.

The United States Constitution supports the historical view that "the formality, certainty, and verbal precision required in an indictment has always been one of the most salient characteristics of English criminal procedure". 3 Holdsworth, History of English Law 616 (3d ed. 1926). *See also Ex parte Wilson*, 1885, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89. The Fifth Amendment

states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." These constitutional provisions and Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C. must be read as intending that the indictment shall cover all essential elements in the offense. *See United States v. Debrow*, 1953, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92.

The defendants correctly assert that their indictment must cover the elements of a violation of § 1341. In *Adjmi v. United States*, 5 Cir. 1965, 346 F.2d 654, 657, *cert. denied*, 382 U.S., 823, 86 S.Ct. 54, 15 L.Ed.2d 69, this Court stated that these elements are (1) a scheme to defraud and (2) use of the mails to effect this scheme.

The indictment in this case clearly alleges both of these elements. The indictment conforms in all respects to the offense under the statute. Short of pleading evidence, which is not required, we do not see how an indictment could possibly be more specific than the one involved here. In oral argument, counsel for the defendants conceded that this indictment was more specific than any he had observed. The indictment adequately protected these defendants against any surprise from the proof presented by the Government. *See Estes v. United States*, 5 Cir. 1964, 335 F.2d 609, 619, *cert. denied*, 1965, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559. *See also United States v. Grayson*, 5 Cir. 1969, F.2d [No. , slip opinion dated September 17, 1969] and *James v. United States*, 5 Cir. 1969, F.2d [No. , slip opinion dated September 18, 1969].

Contrary to the defendants' contention, the Government's Bill of Particulars did not supplement or change or affect the indictment. *See Pipkin v. United States*, 5 Cir. 1957, 243 F.2d 491.

II.

The defendants contend that the delay between the return of the indictment and the commencement of the trial constitutes a denial of their Sixth Amendment right to a speedy trial.

In the present case the indictment was returned in Arizona. The defendants successfully moved the Arizona District Court, under Rule 21(b) of the Federal Rules of Criminal Procedure, 18 U.S.C., for a change of venue to the Southern District of Florida. Subsequently, the Florida District Court retransferred the case to Arizona. The defendants attempted, unsuccessfully, to stay the retransfer by appeals to this Court and to the United States Supreme Court and by a mandamus action to this Court. They succeeded however, in moving the Arizona District Court to return the case to the Southern District of Florida.

The Government properly decided to bring the indictment in Arizona. The business activities of the appellants occurred in Kingman, Arizona. The mailing and receiving of correspondence all occurred in Kingman.

The factors to consider in determining whether a defendant has been deprived of his Sixth Amendment right to a speedy trial are: (1) the length of the delay (2) the reasons for the delay (3) the prejudice suffered

by the defendant and (4) whether the defendant has waived his right. The record affirmatively discloses that the delays in this case were not caused by any arbitrary, capricious, vexatious, oppressive, deliberate, or negligent conduct on the part of the Government. Similarly, the appellants have suffered no serious prejudice as a result of the delays which did not ensue from the ordinary and inevitable delays.

The defendants' assertion that the failure to demand the right to a speedy trial should not constitute a waiver of that right is not to be lightly dismissed. A waiver of one's constitutional right cannot be inferred from a silent record, and the courts must indulge in every reasonable presumption against a waiver of a fundamental constitutional right. *Johnson v. Zerbst*, 1930, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, *See Klopfer v. North Carolina*, 1967, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1.

The record, however, affirmatively indicates that the appellants repeatedly sought the aid of both the Florida and Arizona District Courts, this Court, and the United States Supreme Court in asserting both their constitutional and statutory rights. Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

III.

In considering Gottlieb's motion for judgment of acquittal, the district judge must consider the evidence in the light most favorable to the Government. *Blachly v.*

United States, 5 *Cir.* 1967, 380 F.2d 665. *McFarland v. United States*, 5 Cir. 1960, 273 F.2d 417. It must also consider all the inferences that may reasonably be drawn from the facts. *Cartweight v. United States*, 10 Cir. 1964, 335 F.2d 919.

The district judge, sitting as the trier of fact, found that the evidence was sufficient to show beyond a reasonable doubt that Gottlieb participated in the scheme to defraud. The Government introduced competent, credible testimony to establish the working realtionship of Gottlieb with Auerbach and Randell and Gottlieb's knowledge of the scheme and his participation in it. The Court properly denied Gottlieb's motion for judgment of acquittal.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1969

No. 26343

D. C. Docket No. 64-397-CR-CA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB and
DAVID PROSSER RANDELL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 9, 1969

Issued as Mandate:

BLEED THROUGH, POOR COPY

APPENDIX C

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 26343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB, and
DAVID PROSSER RANDELL,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(February 26, 1970)

ON PETITIONS FOR REHEARING

Before WISDOM, GEWIN, and AINSWORTH,
Circuit Judges.

PER CURIAM: All of the defendants-appellants have petitioned for rehearing. One of the appellants, David P. Randell, has reiterated his original contention that the trial court's order dismissing portions of the indictment constituted an amendment of the indictment thereby ousting the trial court of jurisdiction to proceed to trial. In our per curiam opinion of December 9, 1969,

we did not discuss this contention, because of the liberalizing effect Rule 7(c) and (d) has had on the principles enunciated in *Ex parte* Bain, 1886, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849. We have, however, carefully reviewed the authorities on this point and conclude that the trial court did not commit reversible error. *See Overstreet v. United States*, 5 Cir. 1963, 321 F.2d 459 and *Thomas v. United States*, 5 Cir. 1967, 398 F.2d 531, analyzing in detail the Supreme Court's ruling in *Bain*. *See also Salinger v. United States*, 1926, 272 U.S. 542, 47 S.Ct. 531, 71 L.Ed. 398; 1. C. Wright, Federal Practice and Procedure, § 127 at 275-276 (1969) and 8 J. Moore, Federal Practice, ¶ 7.05[1]-[3] (1969 Cum.Supp.).

It is ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

64-397-CR-CF

INDICTMENT
No. C-4619 Pct.

Violation: 18 U.S.C. 1341 (Mail Fraud)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

THE GRAND JURY CHARGES:

COUNT 1

1. That during all or part of the times hereinafter mentioned LAKE MEAD RANCHEROS, INC., was a corporation organized under the laws of the State of Delaware and licensed to transact business in the State of Arizona, with principal offices at 2320 Madison Street, Hollywood, Florida, and 799 N.W. 62nd Street, Miami, Florida, and using mailing addresses in Kingman, Arizona of 1118 West Beale St., 1039 Fairgrounds Blvd., and 1033 West Beale St., and the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, were officers, directors and stockholders in said corporation and actively engaged in the business thereof.

2. That commencing prior to July 13, 1961, and continuing to the present time, the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, hereinafter referred to as "defendants", devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from persons residing throughout the United States, including but not limited to:

Charles E. Arrington, 20 Vine St., West Lynn, Mass.

Joseph A. Aguello, 8830 - 182nd St., Hollis 23, New York

David L. Brill, 628 Grove Ave., Metuchen, New Jersey

Frank Catalano, 232 Courthouse Road, Franklin Square, L.I., New York

Tullio J. DiLorenzo, 24 Albemarle Place, Yonkers, 2, New York

Richard J. Eddy, 300 Montgomery St., Bloomfield, New Jersey

Otto L. Erbach, 33-15 - 81st Street, Jackson Heights 72, New York

William A. Farrell, 2503 East 19th St., Brooklyn 35, New York

Donald E. Fitch, 3800 Brookcrest Place, Annandale, Virginia

Cameron W. Frazier, Box 498, U.S. Soldiers Home, Washington 25, D.C.

Dominic Giordano, 23 Netto Lane, Plainview, L.I., New York

Melvin S. Gould, 50 Eldorado Blvd., Plainview, L.I., New York.

Francis E. Grenier, 29736 Hillbrook, Livonia, Michigan

Mrs. Ida Groves, 1170 Sledge Ave., Memphis, Tennessee

Martin Hanley, 180 Greenpoint Ave., Brooklyn 22, New York

Joseph Just, 6327 S. Kedvale Ave., Chicago 29, Illinois

Harry Korpela, 2225 Benson Ave., Brooklyn, New York

Robert A. LaBrie, 122 Bradford St., Lawrence, Mass.

Clarence R. Lambert, 393 Buck Road, Holland, Penna.

William W. Mowrey, 34 Rexhame St., Roslindale 31, Mass.

Robert F. Parker, 8510 Superior, Centerline, Mich.

Mrs. Helen A. Perry, 35 Albion St., Bridgeport 5, Conn.

Harry Pray, 289 North Monroe Ave., Lindenhurst, L.I., New York

Miss Carolyn V. Sharpe, 38 St. Andrews Place, Yonkers, New York

Frank Scott, 2565 E. Midland Road, Indianapolis 27, Ind.

Dwayne Shirley, 324 Bacon St., Deerfield, Mich.

Donald J. Thomas, 10306 Oakland, Kansas City 34, Missouri

Don G. Walters, 114 Locust Road, Morton, Penna.

Mrs. Marian C. Zerbe, 4810 Junius, Dallas 10, Texas

Mrs. Marian K. Zisman, 6102 Horner St., Los Angeles, 85, Calif.

Miss Carol M. Zisman, 6102 Horner St., Los Angeles, 35, Calif.

and others to the Grand Jury unknown, said persons representing that closs of person who could be, and were, induced to purchase lots in Lake Mead Rancheros subdivisions located in Mohave County, Arizona, which said scheme and artifice is described more particularly hereinafter.

3. It was a part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to purchase or contract to purchase all or portions of seventeen (17) sections of range land, being odd-numbered sections 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, in Township 25 North, Range 15 West, Gila and Salt River Base and Meridian, situated in Mohave County, Arizona, which said sections, or partial sections of land, were subdivided as Lake Mead Rancheros subdivision units 1 through 17, consisting of approximately 5,513 lots.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to offer the said lots in said Lake Mead Rancheros subdivision units for sale to the public on the deferred payment plan, with a down payment and monthly installment payments until payment in full of the purchase price, by means of advertising which they caused to be published in newspapers throughout the United States and in advertising material mailed by Lake Mead Rancheros, Inc., directly to prospective purchasers.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did cause the mailing addresses of 1118 West Beale Street, 1309 Fairgrounds Blvd., and 1033 West Beale Street in Kingman,

BLEED THROUGH POOR COPY

of Lake Mead Rancheros, Inc., for the purpose of creating in the minds of customers and prospective customers of Lake Mead Rancheros, Inc., the false belief that they were dealing with a company headquartered in Arizona or with operating offices near the property offered for sale; whereas in truth and in fact mail addressed to Lake Mead Rancheros, Inc., at these Kingman, Arizona, addresses was not processed at Kingman at all, but forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida.

6. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivisions make, and cause to be made, in advertising literature published in newspapers and in other literature mailed to prospective purchasers the following deceptive, false and fraudulent representations, well knowing at the time that the representations would be, and were deceptive, false and fraudulent when made:

a. That the Lake Mead Rancheros subdivisions were located "on a through route to Lake Mead"; that "the through route from Highway 66 to Lake Mead winds gracefully through the Rancheros"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to the giant Lake Mead Recreational Area"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to two of the most favored sites in the giant Lake Mead Recreation Area"; that the Rancheros "are directly on Hackberry

Road, main route to the Lake Mead Recreation Area";

b. That the Lake Mead Rancheros subdivisions were "Laid out, waiting for people", "livable now", "not raw, undeveloped", "fully developed" and "improved".

c. That Lake Mead Rancheros are a "jackpot investment", "among the finest investments anywhere", and "directly located in the path of Arizona progress".

d. That "Lake Mead Rancheros is located just a few miles from Kingman, near Lake Mead and Lake Mohave".

7. It was a further part of said scheme and artifice to defraud that the defendants would and did, about September, 1962, after approximately three thousand persons had purchased lots in the said original seventeen Lake Mead Rancheros subdivision units, commence negotiations for the purchase by Lake Mead Rancheros, Inc., of land at the junction of U.S. Highway 66 and Hackberry Road in Mohave County, approximately six miles distant from the nearest of their then existing seventeen subdivision units, which land was adjacent to U.S. Highway 66 along or near which highway there were existing power and telephone lines and a water pipe line carrying water to the City of Kingman, Arizona, and would and did cause Lake Mead Rancheros, Inc., to enter into an agreement with the Arizona Land Title & Trust Company of Tucson, Arizona, on or about January 2, 1963, for the purchase of such land, that land being all of Section 31 lying north of U.S. Highway 66, in Township 24 North, Range 14 West, Gila & Salt River Base and Meridian, in Mohave

County, Arizona, which said Section 31 is crossed by U.S. Highway 66, said purchase agreement providing for the first release of land thereunder to the vendee upon payment of the sum of $51,000.00, which payment is due under the terms of said agreement on or before December 20, 1963, and would and did, on or about January 15, 1963, cause that portion of the said Section 31 situated north of U.S. Highway 66 to be subdivided as Lake Mead Rancheros subdivision unit No. 20.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the continuing purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivision units, make and cause to be made in advertising literature published in newspapers and in other literature mailed by Lake Mead Rancheros, Inc., to lot owners and prospective lot purchasers the following additional deceptive, false and fraudulent representations, commencing about the middle of September, 1962, and continuing to on or about January 2, 1963, well knowing at the time that the representations would be, and were, deceptive, false and fraudulent when made:

a. "Build in a new community coming to life! A new community is about to come to life—and you can have a part of its future! Lake Mead Rancheros has always been one of the best long-range investments you could make . . . but now your investment dollar gets much more! We have acquired COMPLETE UTILITY SERVICES! This means you can own a king-sized western estate . . . with ROADS, and ELECTRICITY, WATER and

PHONES available. Obviously, the presence of utilities makes the Rancheros even more rewarding as investment property . . . for once the community takes shape and homes go up, you can subdivide your 1¼ acres into smaller homesites, for sale at a profit";

b. "ROADS, WATER, ELECTRICITY, PHONES. Every Ranchero is laid out, waiting for you! Piped water, electricity, and phone service available now in the building area at no extra cost. A community is about to come to life . . . in an area already in great demand!";

c. "We have now acquired the land fronting on U.S. 66, in order to offer the vital services you require for comfortable, convenient, wide-open western living! After months of negotiation and frustrating delay, LMR management was successful in getting the land extending down the Hackberry Road to Route 66. This is the vital acreage so necessary to transform the Rancheros from an investment for your future to an investment in a living community, ready for immediate occupancy. This land was the missing link in establishing an orderly development pattern. Now that we own it . . . watch us grow!";

d. "Power lines are already in on this newly acquired land, so LMR owners will get their power at the published rate of the Mohave Electric Cooperative", "Telephone lines traverse this property, too, so houses and busi-

nesses will be served by the Citizens Utility Company of Kingman as the need for telephones develops";

e. "LAKE MEAD RANCHEROS IS READY FOR IMMEDIATE LIVING! We have just spent three weeks—a culmination of months planning—completing details that will guarantee all living facilities for every Ranchero. This means that for the same price as before, you can now own a king-sized western estate . . . with roads, and electricity, water and phones available . . . all the utilities necessary for a growing community";

f. "Those who wish to build immediately may always exchange their parcel for any other available anywhere in the property. In addition, you may exchange your tract for one in the newly acquired land—at no additional cost—at any time within the next three years, providing you build within this period".

9. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in Lake Mead Rancheros subdivisions by use of a falsely labeled photograph, specifically a photograph appearing in an advertising brochure used by Lake Mead Rancheros, Inc., and mailed to prospective lot purchasers, showing land with a power line existing thereon and the statement below the picture: "NOW YOU SEE IT! The Valley of the Music Mountains . . . location of Lake Mead

Rancheros. This is the land as it looked on June 16, 1961, prior to any development work."; well knowing at the time said pretenses and representations were made that they were deceptive, false and fraudulent.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in the said Lake Mead Rancheros subdivisions by withholding and failing to disclose in the advertising of Lake Mead Rancheros, Inc., the material fact that the various Lake Mead Rancheros subdivision units consisted of only the odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes.

11. On or about September 17, 1961, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused to be delivered by mail at Kingman, within the State and District of Arizona, according to the direction thereon, a letter containing a $10.00 check, mailed by Otto L. Erbach, 33-15 - 81st, Jackson Heights 72, New York, and addressed to Lake Mead Rancheros, Kingman, Arizona, in violation of 18 U.S.C. 1341.

COUNT II.

1. The Grand Jury realleges, with the same force and effect as though fully set forth in detail herein, all of the allegations contained in paragraphs 1 through 10 of Count I of this Indictment, and further alleges;

• • •

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 2, 1964]

No. 64-397-Cr-CF

UNITED STATES OF AMERICA,
Plaintiff,

v.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

BILL OF PARTICULARS

COMES NOW the plaintiff, United States of America, and submits its Bill of Particulars pursuant to the court order of July 27, 1964 in the above entitled cause.

I.

The representations in Paragraph 6(a) of the indictment, when considered in the light of the statement made in the same advertising that three and one-half million people visit Lake Mead recreation areas annually, are false and fraudulent in that they are designed to and did mislead and deceive purchasers of lots in the Lake Mead Rancheros subdivisions to believe that these visitors to the Lake Mead recreational area or at least two of its most favored sights would have to pass by or through the Lake Mead Rancheros subdivision via Hackberry Road if

they travelled the main route, the thoroughfare and the through route to the Lake Mead recreational area, thereby creating an attractive investment feature, that is, exposure to, and in the path of, heavy tourist traffic, whereas Hackberry Road is a gravelled road which leads off of Highway 66 and crosses Lake Mead Rancheros property and proceeds about 48 miles to Pierce Ferry Boat Landing and Gregg's Ferry Landing, two of the least used, developed or visited access points on Lake Mead; that Hackberry Road is not commonly known or used as a through route, and is not the thoroughfare or main route to the Lake Mead recreation areas or at least two of the most favorite sights in the Lake Mead recreation area; the commonly known and used through route, thoroughfare or main route to Lake Mead and its favored recreational sights being Highways 66 and 93.

II.

The representations in Paragraph 6(b) of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead subdivision units to believe that Lake Mead Rancheros property had available the necessary utilities to accommodate residential or commercial buildings on individual lot sites such as power lines, telephone lines and a potable water supply, whereas there were no power lines, telephone lines or potable water supply on any of the original seventeen subdivisions to which this advertising was directed and, therefore, were not "fully developed" or "liveable now".

III.

The representations in Paragraph 6(c) of the indictment are false and fraudulent in part, for reasons set out in Paragraphs I and II above and further, in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that purchase of lots in the subdivision units of the Lake Mead Rancheros was a favorable investment and was in the path of Arizona progress, whereas said property is not in the path of progress and is not a suitable investment for those contemplating a commercial and residential lot site purchase by the very nature of the pattern in which these subdivisions lay, to-wit, the seventeen Lake Mead Rancheros subdivision units comprise all the odd-numbered sections of land in a township in which all the even-numbered sections are owned by the government and subject to use for cattle grazing purposes, this checker board pattern, so to speak, being a material fact adversely affecting the probability or possibility of an orderly residential community ever developing on the subdivisions and further, that the aforesaid subdivisions had no power lines, telephone lines or potable water supply and under the circumstances, no reasonable prospects of said facilities and utilities servicing this land subdivided for residential lot sites, thereby making said land not an investment as represented.

IV.

The representations in Paragraph 6(d) of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that said land

had a close proximity to the stated points so as to favorably affect the investment potential of Lake Mead Rancheros property, whereas the defendants failed to disclose the material fact that their land is 26 miles from Kingman, Arizona, approximately 57 miles from the nearest access point on Lake Mohave and approximately 48 miles from the nearest access point on Lake Mead via existing road, said distances providing no favorable effect on the investment potential of said property.

V.

The representations in Paragraphs 8(a-f) are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that (a) Lake Mead Rancheros had acquired new land that provided complete utility services, such as telephone lines, power lines and potable water supply to accommodate residential and commercial buildings on Lake Mead Rancheros subdivision lot sites, whereas in truth and in fact Lake Mead Ran cheros had not acquired any such land nor any such utilities.

VI.

The pretenses and representations in Paragraph 9 of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that the power line pictured in the said photograph was located on land on Lake Mead Rancheros subdivisions or on land owned by Lake Mead Rancheros, Inc., whereas

the land appearing in the said photograph was not a part of the said Lake Mead Rancheros subdivisions or land owned by Lake Mead Rancheros, Inc. at the time, nor did any power lines exist on Lake Mead Rancheros property at the time.

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY

By
Edward A. Kaufman
Assistant U.S. Attorney

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Adjmi v. *United States*, 346 F. 2d 654, certiorari denied, 382 U.S. 823	6
Beavers v. *Haubert*, 198 U.S. 77	7
Blachly v. *United States*, 380 F. 2d 665	10
Estes v. *United States*, 335 F. 2d 609, certiorari denied, 379 U.S. 964	6
McFarland v. *United States*, 273 F. 2d 417	10
Milam v. *United States*, 322 F. 2d 104, certiorari denied *sub nom. Kimball* v. *United States*, 377 U.S. 911	6
Pipkin v. *United States*, 243 F. 2d 491	7
Pollard v. *United States*, 352 U.S. 354	7
Reece v. *United States*, 337 F. 2d 852	8
Silverman v. *United States*, 213 F. 2d 405, certiorari denied, 348 U.S. 828	6
United States v. *Debrow*, 346 U.S. 374	6
United States v. *Ewell*, 383 U.S. 116	7, 9

383-256—70

Constitution, statutes and rule:

United States Constitution:

	Page
Fifth Amendment	2
Sixth Amendment	2, 7
Federal Mail Fraud Statute, 18 U.S.C. 1341	1, 2, 6, 9
Federal Rules of Criminal Procedure:	
Rule 7(c)	2
Rule 21(b)	4

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1353

DORY AUERBACH AND IRVING GOTTLIEB,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1–6) is reported at 420 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969 (Pet. App. 7–8). Petitions for rehearing were denied on February 26, 1970 (Pet. App. 9–10). On March 26, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment charging petitioners with violating the Federal Mail Fraud Statute, 18

U.S.C. 1341, was so vague and indefinite as to fail to meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure and deprive petitioners of their constitutional rights under the Fifth and Sixth Amendments.

2. Whether petitioners were denied their Sixth Amendment right to a speedy trial.

3. Whether the evidence was sufficient to sustain the conviction of the petitioner Gottlieb.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioners and one David Prosser Randell with mail fraud in violation of 18 U.S.C. 1341 (Pet. App. 11–20) in connection with offers to the public to sell certain real estate located in Mohave County, Arizona (R. 2572, 2585–2601). The indictment alleged petitioners and Randell were officers, directors and stockholders of Lake Mead Rancheros, Inc.—a Delaware corporation licensed to transact business and having mailing addresses in Kingman, Arizona but with principal offices in Florida—and were actively engaged in the business of that corporation (Pet. App. 11).

Prior to July 13, 1961, and continuing to the return of the indictment, petitioners and Randell are alleged to have devised and entered into a scheme to defraud prospective land purchasers (Pet. App. 12–14) by inducing them through newspaper publications and mailings of deceptive advertising literature to pur-

BLEED THROUGH POOR COPY

chase lots falsely and fraudulently represented to be fine investments, located just a few miles from Kingman on a through route to Lake Mead near Lake Mead and Lake Mohave (Pet. App. 15–16), equipped with complete utility services for electricity, water and phones (Pet. App. 17–19) and "ready for immediate living" (Pet. App. 19). The indictment alleged that petitioners and Randell, as part of their scheme to defraud, mailed to prospective purchasers a falsely labeled photograph showing land with a power line existing thereon (Pet. App. 19–20), and that they failed in their advertising to disclose the corporation's subdivision units consisted only of odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land were owned by the federal government for grazing purposes (Pet. App. 20). In a general description of the scheme, it was alleged that petitioners and Randell caused the Kingman, Arizona mailing addresses of Lake Mead Rancheros, Inc. to be used in advertising the sale of available lots so that prospective purchasers would believe they were dealing with a company headquartered in Arizona; in fact, mail addressed to and received in Kingman was not processed there, "but forwarded to Lake Mead Rancheros, Inc. at Hollywood, Florida, or Miami, Florida" (Pet. App. 14–15). Each count of the indictment charged petitioners and Randell with knowingly causing a separate interstate mailing of a check by a purchaser from a point in the United States to Kingman, Arizona (Pet. App. 20).

COPY BOUND CLOSE IN CENTER

On August 16, 1963, petitioners and Randell moved pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure for an order transferring the cause to the United States District Court for the Southern District of Florida (R. 2613). The motion was initially denied on November 18, 1963 (see Docket Entries), but, on rehearing (July 27, 1964), it was granted and the government was ordered to file a bill of particulars (R. 2698, 2700, 2707).[1] On February 26, 1965, Judge Charles B. Fulton of the United States District Court for the Southern District of Florida retransferred the case *sua sponte* to the United States District Court for the District of Arizona (R. 2715-2716).[2] The Court of Appeals for the Fifth Circuit (Judge Brown dissenting) dismissed an appeal from Judge Fulton's order as interlocutory (R. 2763, 347 F.2d 742 (C.A. 5)), and this Court denied certiorari

[1] Visiting Judge William C. Mathes (of California) sitting in the Arizona district ordered the government to file a bill of particulars stating wherein certain representations were claimed to be false and fraudulent, but he denied a motion for a bill of particulars as to whether the offense occurred in more than one jurisdiction, noting that this was a question of law (R. 2698, 2700, 2707). The bill of particulars was filed on October 2, 1964.

[2] Judge Fulton concluded, after careful inspection of the indictment and the recently filed bill of particulars, that there was no allegation that material was either posted from or received in the Southern District of Florida. He noted that the allegation stating the purported fraud involved forwarding material to Florida did not charge that the mails were used in the process, and for "these reasons" the cause was being transferred (R. 2175-2176).

BLEED THROUGH POOR COPY

on December 13, 1965 (R. 2836, 382 U.S. 958). A petition for a writ of mandamus filed in the court of appeals was denied on January 5, 1966.

On October 6, 1966, petitioners and Randell filed a new motion seeking to retransfer the case to the United States District Court for the Southern District of Florida (R. 2770), which motion was granted by the Arizona district court on December 13, 1966 (R. 2773). Following assignment to a trial judge (R. 2774) and pre-trial conference (R. 2775–2777), notice was entered on July 28, 1967 (R. 2778) setting the case for trial on January 29, 1968. On December 11, 1967, a motion was made to dismiss for lack of speedy trial (R. 2800) and was denied (R. 2994).

The case was tried without a jury and petitioners and co-defendant Randell were found guilty on all counts. On June 14, 1968, the court sentenced petitioner Auerbach to concurrent prison terms of one year on each of counts 1 through 22 inclusive, suspended sentence, placed him on a probation for three years and ordered him to pay a $10,000 fine (R. 3045); the court sentenced petitioner Gottlieb to concurrent prison terms of six months on each of counts 1 through 22 inclusive, suspended sentence, placed him on probation for three years, and ordered him to pay a $5,000 fine (R. 3047). On appeal the convictions were affirmed (Pet. App. 1–8) and petitions for rehearing were denied (Pet. App. 9–10).

ARGUMENT

1. Petitioners challenge the indictment as being insufficient in that it does not inform the accused in

COPY BOUND CLOSE IN CENTER

precise detail why and in what factual respects the allegedly deceptive advertising literature was false or fraudulent. This contention fails to focus on the only two essential elements of a violation of 18 U.S.C. 1341: (1) a scheme to defraud and (2) use of the mails to effect this scheme. *Adjmi* v. *United States,* 346 F.2d 654, 657 (C.A. 5), certiorari denied, 382 U.S. 823. As pointed out by the court of appeals (Pet. App. 3), the "indictment in this case clearly alleges both of these elements." Since the scheme alleged need not be fraudulent on its face but merely need be reasonably calculated to deceive, *Silverman* v. *United States,* 213 F.2d 405, 407 (C.A. 5), certiorari denied, 348 U.S. 828, it is not necessary that the indictment particularize specific false or fraudulent representations. To do so would constitute the pleading of evidentiary facts which is not required. *Milam* v. *United States,* 322 F.2d 104, 108–109 (C.A. 5), certiorari denied *sub nom. Kimball* v. *United States,* 377 U.S. 911. As the opinion below succinctly concludes: "Short of pleading evidence, which is not required, we do not see how an indictment could possibly be more specific than the one involved here" (Pet. App. 3). Clearly, enough was alleged to enable petitioners "to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense", *United States* v. *Debrow,* 346 U.S. 374, 378, and petitioners were "adequately protected * * * against any surprise from the proof presented by the Government" (Pet. App. 3). See *Estes* v. *United States,* 335 F.2d 609, 619 (C.A. 5), certiorari denied, 379 U.S. 964.

BLEED THROUGH POOR COPY

Petitioners contend that the government's bill of particulars, requested by petitioners and filed October 2, 1964 pursuant to court order, improperly amended the original indictment and was, in effect, tantamount to a superseding indictment. It was, so petitioners argue, an effort by the government to cure defects in the original indictment through "the guise of a bill of particulars" (Pet. 34). Such a position presupposes deficiencies in the original indictment which did not exist in this case. Here, the bill of particulars merely served its legitimate function of "better appris[ing] the defendant of what he is expected to meet," *Pipkin* v. *United States*, 243 F.2d 491, 494 (C.A. 5), and, as recognized by the court of appeals, "did not supplement or change or affect the indictment" (Pet. App. 4). Petitioners can hardly complain because the government furnished the specific information they themselves requested in their motion for a bill of particulars.

2. Petitioners' contention that they were denied their right to a speedy trial as guaranteed by the Sixth Amendment is equally without merit. Such a right is necessarily relative and depends upon the circumstances of the particular case. *United States* v. *Ewell*, 383 U.S. 116; *Pollard* v. *United States*, 352 U.S. 354; *Beavers* v. *Haubert*, 198 U.S. 77. Much is made here of the four years and nine months which elapsed between the date of arraignment (April 29, 1963) in this case and the commencement of trial (January 29, 1968) (Pet. 9–15). But, as petitioners correctly assert, "[t]ime is but one factor to be considered in a case

COPY BOUND CLOSE IN CENTER

such as this" (Pet. 15). Consideration must also be given to other factors: (1) the reasons for the delay, (2) the prejudice to petitioners occasioned by the delay and (3) whether petitioners have waived their right to a speedy trial (Pet. App. 4–5).

Here, petitioners concede (Pet. 9) the major delays were brought on by their own motion in the Arizona District Court (August 16, 1963) for a change of venue to the Southern District of Florida. After the motion was granted on rehearing (July 27, 1964), the Florida District Court *sua sponte* ordered the case to be retransferred (February 26, 1965) to Arizona. Petitioners unsuccessfully appealed this order to the court of appeals (June 18, 1965) and, subsequently, were denied respective petitions for a writ of certiorari (December 13, 1965) and for a writ of mandamus (January 5, 1966). Thereafter they succeeded, however, in moving the Arizona District Court (December 13, 1966) to return the case to the Southern District of Florida.

Notwithstanding they were responsible for all the transfer proceedings, petitioners attribute responsibility for delays occasioned thereby to the government on the ground that the government's initial selection of the Arizona forum was improper. In attempting to demonstrate such delays were "purposeful and oppressive," see *Reece* v. *United States*, 337 F.2d 852, 853 (C.A. 5), they point to the government's continued opposition to their motions and appeals as being unwarranted (Pet. 18), apparently in complete disregard of the regularity with which the courts upheld the gov-

BLEED THROUGH POOR COPY

ernment's position. Such arguments overlook the fact that business activities of the petitioners occurred in Kingman, Arizona, and correspondence and checks were mailed interstate to and were received in Kingman (Pet. App. 4). Certainly such contacts with the original forum state support an initial decision to bring an indictment for violations of the Federal Mail Fraud Statute in Arizona. Further, as noted by the court below, the "record affirmatively discloses that the delays in this case were not caused by any arbitrary, capricious, vexatious, oppressive, deliberate, or negligent conduct on the part of the Government"[3] (Pet. App. 5).

Nor do petitioners demonstrate they suffered serious prejudice in defending themselves as a consequence of these delays. See *United States* v. *Ewell, supra* at 120. Their only contention in this regard (Pet. 18–19) is that certain letters written between 1963 and 1965 from co-defendant Randell to petitioner Auerbach were available to the government after 1967 for use in its cross-examination of Randell at trial. These letters, however, dealt only with the

[3] As to petitioners' claim that there existed prolonged periods of delay between the actual court hearings on the venue issue (including appeals) which were unrelated to the litigation and were due to "the request of the prosecution * * * government inaction, or mere dormancy of the file" (Pet. 9), the court of appeals quite correctly pointed out that such delays were an inevitable outgrowth of petitioners' own motions and appeals. "Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon" (Pet. App. 5).

COPY BOUND CLOSE IN CENTER

routine operations of corporate business and were not even objected to by petitioners when introduced into evidence at trial (R. 2319–2334, 2385; Gov. Ex. 66). Indeed, defense counsel stated to the court that he had "no serious objection" to the letters which he expressly characterized as being "so self-serving that we could never get this in [in the defendants' case]" (R. 2386).

3. Petitioner Gottlieb contends (Pet. 35–41) the evidence at trial was insufficient as a matter of law to sustain his conviction and seeks reversal of the district judge's denial of his motion for judgment of acquittal. As pointed out by the court below (Pet. App. 5–6), in considering Gottlieb's motion the district judge was required to view the evidence in the light most favorable to the government (*Blachly* v. *United States*, 380 F.2d 665 (C.A. 5); *McFarland* v. *United States*, 273 F.2d 417 (C.A. 5)), and to consider all the inferences reasonably to be drawn from the facts.

Viewed in this light, the testimony introduced at trial by the government reflected beyond a reasonable doubt that Gottlieb had a close working relationship with both petitioner Auerbach and co-defendant Randell, that he knew about the scheme alleged and that he actively participated in the implementation of that scheme. For example, testimony revealed Gottlieb was the secretary-treasurer and a stockholder of Lake Mead Rancheros, Inc. (R. 1355). Petitioner Auerbach, the corporation's president, referred to Gottlieb as his "right hand man" (R. 159). Gottlieb sat in on dis-

BLEED THROUGH POOR COPY

cussions regarding the placing of newspaper advertisements on behalf of the corporation (R. 232–233). He was the general office manager and overseer of work in the principal office (R. 950). He dictated letters answering customer inquiries regarding the nature of the corporation's lots (R. 951, 963). Significantly, it was Gottlieb who made the decision to issue warranty deeds in the wash areas (those areas shown to be unsuitable for development; see R. 78, 83–84) instead of transferring customers to an area not in the wash area (R. 979). This and other testimony indicating Gottlieb's awareness of and participation in the venture (see R. 995–996, 1005, 1018) amply support the rulings of both courts below upholding his conviction.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970